

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

PARENTS DEFENDING EDUCATION,	)	
	)	
PLAINTIFF,	)	CASE NO. 2:23-cv-1595
	)	
vs.	)	
	)	
OLENTANGY LOCAL SCHOOL DISTRICT	)	
BOARD OF EDUCATION, <i>et al.</i> ,	)	
	)	
	)	
DEFENDANTS.	)	
	)	

TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS  
BEFORE THE HONORABLE ALGENON L. MARBLEY  
UNITED STATES DISTRICT JUDGE  
JULY 31, 2023; 10:00 A.M.  
COLUMBUS, OHIO

APPEARANCES:

FOR THE PLAINTIFF:

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Proceedings recorded by mechanical stenography,  
transcript produced by computer.

MONDAY MORNING SESSION

JULY 24, 2023

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(The following proceeding was held in chambers with all  
counsel present.)

THE COURT: Good morning, everyone.

I'm going to have you introduce yourselves on the record  
when we get back in court, but I'll have you do that now so I  
know who I'm talking to. So counsel for the plaintiff.

MR. HASSON: James Hasson with my colleagues --

THE COURT: Mr. Hasson, where are you from? I know  
there are two firms involved.

MR. HASSON: From Consovoy and McCarthy based out of  
Virginia.

MR. CONNOLLY: Michael Connolly from Consovoy and  
McCarthy.

MR. ROBINSON: Emmett Robinson from Robinson Law Firm.  
It's generously called a firm.

THE COURT: And that's in Cleveland, right?

MR. ROBINSON: That's right.

THE COURT: Counsel for the defense.

MR. FREEZE: Bartholomew Freeze, Freund, Freeze and  
Arnold.

MS. HOFFMAN: Genevieve Hoffman, Freund, Freeze and  
Arnold.

1 MS. PHILEMOND: Jessica Philemond, Scott Scriven.

2 MS. FAUST: Sarah Faust, Scott Scriven.

3 THE COURT: It's been a while, Ms. Philemond.

4 You might be the only one who knows what I'm going to  
5 say here. First of all, I was going to determine whether --  
6 who -- whether you were going to have witnesses today?

7 MR. HASSON: No, Your Honor.

8 THE COURT: So you're just going to be arguing points  
9 of law. You're going to be relying on the affidavits. Fair  
10 statement?

11 MR. HASSON: That's correct, Your Honor, truly on our  
12 briefs and attached exhibits.

13 THE COURT: Good enough.

14 That brings me to the most -- the important question. I  
15 wanted to make sure -- I know that all of you have done a  
16 number of probably circuit arguments and oral arguments before  
17 different judges and different venues throughout the country.  
18 And there's one thing that's common among all of us is that a  
19 judge's questions are opportunities to persuade. If you don't  
20 answer my questions, then your opportunity to persuade me is  
21 essentially torn asunder.

22 So I want to make sure that everybody understands that I  
23 read the briefs and, equally as important, I've done my own  
24 independent research so I know what the law really says. I  
25 don't need anyone to read me their briefs. I'm sure everyone

1 has beautiful outlines you would like to get through. If you  
2 don't get through them, don't worry about it. The only purpose  
3 for oral argument is for you to answer my questions so I can  
4 fill in gaps in my knowledge and get a better understanding of  
5 the arguments.

6 The briefs were well written. They were clear. But  
7 even clear briefs need backfill from time to time. And there's  
8 some unsettled areas of law.

9 So I just want you to understand the importance of  
10 answering my questions and, in exchange, I will promise you  
11 that I will allow you to say whatever you want to say about my  
12 questions and to elaborate on your answers. But I need my  
13 questions answered as asked because, when you answer them as  
14 asked, I want you to understand, at least from this judge, that  
15 that is not a concession. It's simply an answer. A lot of  
16 times lawyers say, well, if I answer it this way, I'm conceding  
17 this point. If you don't answer it, you lose the point. So a  
18 loss, a concession, is essentially the same thing. It might be  
19 a distinction without a difference.

20 So I want to make it clear on an important issue such as  
21 this that my questions are answered clearly because like -- as  
22 you have seen, other courts in the country are struggling with  
23 some of these same issues. So there are no clear-cut answers;  
24 so the questions may be nuanced and your answers may be  
25 nuanced. If you have nuanced answers, they might beget other

1 questions. The key is to answer the questions as asked so we  
2 can gain clarity in some of these murky areas.

3 Any questions from the plaintiff?

4 MR. HASSON: No, Your Honor.

5 THE COURT: Any questions from the defense?

6 MR. FREEZE: No, Your Honor.

7 THE COURT: Who is going to argue for the plaintiff?

8 MR. HASSON: I will, Your Honor.

9 THE COURT: Who is going to argue for the defendants?

10 MR. FREEZE: I will.

11 THE COURT: Good enough. Let's get started.

12 (End of chambers conference.)

13 (The following proceeding was held in open court.)

14 THE COURT: Ms. Stash, would you please call the case.

15 THE DEPUTY CLERK: Case No. 2:23-cv-1595, Parents  
16 Defending Education v. Olentangy Local School District Board of  
17 Education, et al.

18 THE COURT: Would counsel please identify themselves  
19 for the record beginning with counsel for the plaintiff.

20 MR. HASSON: Yes, Your Honor. James Hasson for  
21 plaintiff, Parents Defending Education, with my colleagues  
22 Michael Connolly and Emmett Robinson.

23 THE COURT: Good morning. Counsel for the defense.

24 MR. FREEZE: Good morning, Your Honor. Bartholomew  
25 Freeze for the Olentangy Local School District Board of

1 Education and its board members and employees who have been  
2 named in the lawsuit.

3 MS. HOFFMAN: Genevieve Hoffman with Freund, Freeze  
4 and Arnold for the defendants.

5 MS. PHILEMOND: Jessica Philemond with Scott Scriven  
6 for the defendants. And that completes defense counsel.

7 THE COURT: For the record, Ms. Philemond, would you  
8 identify the other persons at counsel table.

9 MS. PHILEMOND: Yes, Your Honor. With us today is  
10 Todd Meyer, superintendent of Olentangy Schools, and a summer  
11 clerk from our office, Sarah Faust.

12 THE COURT: Ms. Faust, please stand. I can't see you  
13 over -- good morning, Ms. Faust.

14 Ms. Faust, where are you a student?

15 MS. FAUST: I'm a student at the Ohio State  
16 University.

17 THE COURT: What year are you?

18 MS. FAUST: I just finished my first year of law  
19 school.

20 THE COURT: What do you think?

21 MS. FAUST: It was an interesting experience, Your  
22 Honor.

23 THE COURT: That's a fair and honest answer. That's a  
24 fair and honest answer.

25 We're here this morning on the plaintiff's motion for a

1 preliminary injunction. Mr. Hasson and Mr. Freeze, each side  
2 will have 30 minutes. Mr. Hasson, you may reserve time for  
3 rebuttal.

4 I'm going to ask all of you to first address the issue  
5 of standing and then address the four prongs of the preliminary  
6 injunction standard, or at least structure your argument within  
7 the four prongs. I'm going to give you all a hint, though. I  
8 think it was the Cheshire Cat who said if you don't know where  
9 you're going, it doesn't matter which road you take.

10 So I find compelling the likelihood of success on the  
11 merits prong. I think that that's one that merits some  
12 emphasis. I want to know something, too, about the balancing  
13 of hardships, where you juxtapose a student's desire to call --  
14 let's say that there is a trans student who was born physically  
15 identifiable as male whose name was Terrence but he came to  
16 realize that he was female and he changed his name to Terri.  
17 So I want to balance the hardship that's visited upon one of  
18 the anonymous parents' students -- kids -- whether it's more  
19 difficult for them to simply call the student Terri than it is  
20 for him to reconcile Terri with his well-founded religious  
21 beliefs.

22 That's just a preview of some of the questions that I  
23 have contemplated since this motion came in.

24 Mr. Hasson, are you ready to proceed?

25 MR. HASSON: Yes, I am, Your Honor.



1 THE COURT: Please proceed.

2 How much time do you wish for rebuttal?

3 MR. HASSON: I'd like to reserve five minutes for  
4 rebuttal.

5 THE COURT: Ms. Stash is the official timekeeper.

6 Mr. Hasson, please proceed.

7 MR. HASSON: Thank you, Your Honor.

8 May it please the Court. James Hasson for the  
9 plaintiff, Parents Defending Education. In *West Virginia v.*  
10 *Barnette*, the Supreme Court held that public schools cannot  
11 compel students to profess beliefs they do not hold. It  
12 emphasized there are no, quote, circumstances which permit an  
13 exception to this rule.

14 The topics of public debate may be different today than  
15 they were then, but the First Amendment principle applies all  
16 the same. By requiring students to salute the flag, the school  
17 district in *Barnette* forced them to publicly, quote, affirm a  
18 belief and attitude of mind to their classmates. That was  
19 compelled speech and it was unconstitutional. By requiring  
20 PDE's members to use pronouns that do not align with biological  
21 sex, the Olentangy School District is forcing them to  
22 publically --

23 THE COURT: Let's take that for a minute: Terrence and  
24 Terri. Why can't those kids simply call someone by their new  
25 name: Terri? They don't have to use a pronoun. They don't

1 have to say his or her. They can just say this is Terri's coat  
2 as opposed to this is Terrence's coat.

3 What harm could that possibly visit about your client's  
4 child? What difference does it make for the child to call  
5 somebody Terri instead of Terrence?

6 MR. HASSON: That's a great question, Your Honor. I'd  
7 like to begin by emphasizing first that our focus is on  
8 pronouns because, as the Sixth Circuit recognized, those do --  
9 recognized in *Meriwether*, those implicitly carry a message, the  
10 use of pronouns.

11 THE COURT: So does the use of a name. That  
12 implicitly carries the same message. It's almost like forcing  
13 the Court to choose between a noun and a pronoun, a proper noun  
14 and a pronoun, because they're both labels, right?

15 MR. HASSON: A noun and a pronoun are perhaps  
16 different things. But to your point, one is a label.

17 My name is James. People call me Jim. And that does  
18 not contain a statement about whether or not I am male or  
19 female. You could have a -- there's some names that both males  
20 use and females use. But saying he or saying she, as the Sixth  
21 Circuit recognized in *Meriwether*, comes with a statement that  
22 in a case of Terri and Terrence, calling somebody -- if you  
23 believe that people are biologically male or female, to use  
24 "she" instead of "he" necessarily carries a statement that you  
25 believe the idea that gender is a spectrum or any other kind

1 of --

2 THE COURT: Why can't it be that's just a person's  
3 name? I mean, why does that student have a right to use a  
4 pronoun instead of a noun? What rights does Terrence have to  
5 be called by his given name, and his given name now is Terri?

6 It's like you sending your son to school and his name is  
7 also James, but a group of his classmates decide there are too  
8 many Jimmys and Jameses around so they're going to call him  
9 Harry. And you don't like the name Harry. Calling him Harry  
10 constantly is offensive because it tells him we don't recognize  
11 who you think you are. We recognize who we want you to be.  
12 And since we're -- when we're the majority, we can do that. We  
13 have the numbers. We can bully you. We can tell you that your  
14 name is Harry until we force you to accept that because that's  
15 what we think. That's what -- and we don't want any more  
16 Jimmys.

17 MR. HASSON: I think a name is different than -- to  
18 answer the question directly, Your Honor, our position here  
19 isn't that calling someone -- that they must call somebody --

20 THE COURT: The reason I ask that question is there is  
21 an alternative here. You see, it's almost like your clients  
22 want their children to be able to do what they want to do.  
23 They're the majority. It's couched under the veil of religion.  
24 But implicit in the concept of ordered liberties in everything  
25 we hold holy in this country and in this Constitution is

1 religious freedom, the freedom to worship as you choose and the  
2 freedom not to worship and the freedom not to be subjected to  
3 the tyranny of a religious majority who says that we think we  
4 ought to be able to call him a pronoun. I don't care what his  
5 name is. I want to make sure -- and it may be the parents. I  
6 want to make sure Terrence is called Terrence because he was  
7 born with a penis. In our religion, that's what we do and  
8 we're the majority here.

9 Those are not the precepts on which this country was  
10 founded. It was founded on the view that there is freedom of  
11 religion which means to be free from the tyranny of religion.  
12 That's what the pilgrims escaped from, the tyranny of religion.  
13 The parents should go back to History 101 and understand that.

14 Tell me why it is that religion can be used as a sword  
15 here to make this child Terri be called Terrence, "he," because  
16 that's what their religion says when, as an option, they can  
17 simply call that person Terri.

18 MR. HASSON: Your Honor --

19 THE COURT: Where is it in the law?

20 MR. HASSON: If I may on a few different points,  
21 please, Your Honor. First of all, PDE did not bring a  
22 religious liberty claim. This is a speech claim.

23 THE COURT: I understand.

24 MR. HASSON: To that point, if you reference paragraph  
25 21 of Parent D's declaration, Parent D talks about those

1 beliefs being motivated by science. These are not simply just  
2 a motivation -- a religiously motivated belief.

3 To that end, the Supreme Court in *Barnette* specifically  
4 stated that it wouldn't matter if beliefs were motivated by  
5 religion or if they're motivated by something else because the  
6 constitutional infirmity is the government compelling speech  
7 and compelling agreements with ideas.

8 To your second point, PDE is not saying that nobody else  
9 can use pronouns as their beliefs dictate, or names as their  
10 beliefs dictate. It's not even saying that its children don't  
11 want to use a name that somebody has asked to be called just  
12 like any other nickname or anything else. They're simply  
13 saying they -- and when I say PDE's members, the children of  
14 Parents A, B and D are all PDE members as well; so as a  
15 shorthand. They're saying they do not want to be required to  
16 make a statement about biological sex and gender that they do  
17 not believe.

18 And it is --

19 THE COURT: But that's my point. They don't believe  
20 that Terrence is female, right? And so they don't want to be  
21 compelled to go against the science or the religion. Why can't  
22 they call Terrence "Terri"? If I'm going to balance the  
23 hardships as a part of this, what prohibits me from saying,  
24 well, you know, considering what has happened to some of the  
25 science and data with respect to a higher incidence of suicides

1 for trans students and the like, what is to prohibit your  
2 clients from simply calling him by his given name, whatever his  
3 given name is right now - Terri - if I'm balancing the  
4 hardships?

5 MR. HASSON: I would refer to the Sixth Circuit's  
6 conclusion in the *Meriwether* case where they said in a  
7 pedagogical environment, at some point the use of pronouns is a  
8 virtual necessity. If the children are in the same classroom  
9 for eight hours a day, six years in a row, then at some point  
10 it's going to come up.

11 But as a broader point, this isn't simply -- the  
12 policies simply do not -- are not limited simply to compelled  
13 speech. They're also overbroad. The way they're written says  
14 that any statement that you make that another person finds,  
15 quote, offensive, dehumanizing, derogatory or insulting on the  
16 basis of gender identity can also be grounds for harassment.  
17 So simply a statement, as we cited in our reply brief, "I bear  
18 no ill will towards anyone, but I do not believe that people  
19 can transition from one sex to another," that would also  
20 violate the policies. And that is content based and also  
21 viewpoint based.

22 We're not simply in the land of using names or not.  
23 We're in the land of expressing beliefs. And pronouns carry  
24 beliefs and other statements as well, Your Honor.

25 THE COURT: So, in *Meriwether*, the university

1 professor taught a political philosophy course where  
2 discussions about gender identity often came up, right?

3 MR. HASSON: Yes, Your Honor.

4 THE COURT: By prohibiting him from using pronouns  
5 that he preferred when addressing students, the Court found  
6 that the university apparently, quote, silenced a viewpoint  
7 that could have catalyzed a robust and insightful in-class  
8 discussion.

9 Is that a distinction without a difference, the facts in  
10 *Meriwether*, Mr. Hasson?

11 MR. HASSON: I think for this purpose, the facts are  
12 actually relatively similar. And the fact that we're dealing  
13 with students versus a professor I think is immaterial because  
14 in this case also, if you look at I believe it's exhibits -- or  
15 actually the declarations of Parents B and C, they -- or B and  
16 D, they talk about surveys that required -- students are  
17 required to say which pronouns they should be used by. So it  
18 does --

19 THE COURT: Were the students asked about that in the  
20 survey?

21 MR. HASSON: Say again, Your Honor.

22 THE COURT: Were the students asked about it in the  
23 survey?

24 MR. HASSON: If you refer to declaration of Parent  
25 B --

1 THE COURT: They were, weren't they? That was the  
2 point of the survey. But when they have roll call in the  
3 morning, do they say -- they point to a student and say she or  
4 do they point to a student and say he? No. They call them by  
5 what? What do they call them by, Mr. Hasson, when they do roll  
6 call?

7 MR. HASSON: When the teacher does roll call?

8 THE COURT: Yes.

9 MR. HASSON: I believe the teacher --

10 THE COURT: I know it's been a while since all of us  
11 were in -- they call them by their names. And when they want  
12 to go and visit each other, they don't say, can I go to her  
13 house? They say can I go to Sally's? Or can I go to Billy's?  
14 Or can I go to Jim's? Isn't that what they say?

15 Because, you see, in *Meriwether*, because of the nature  
16 of the subject taught, those kinds of gender identity issues  
17 and pronoun proliferation was necessary.

18 When teachers are in a classroom -- and I know because I  
19 still teach. You know, I don't say him or her. I'll say Will,  
20 or Jim, or Mr. Hasson, or Mr. Madison, whatever the case may  
21 be. I use names and not pronouns. So this fixation on pronoun  
22 could be a ruse. I'm not certain that *Meriwether* controls in  
23 this case because there is an argument that can be made that  
24 the professor, because of the nature of the work, was required  
25 to use pronouns more so than you would in common social



1 intercourse.

2 But I took you off of message. Go back to what you were  
3 saying.

4 MR. HASSON: Thank you, Your Honor.

5 To respond to some of what you just asked right there,  
6 I'd like to point out two things. First, at some point,  
7 students, of course, use names, identify people by names from  
8 time to time. That's just part of normal human interaction.  
9 But I think also, as part of normal conversation, it is  
10 virtually impossible to avoid speaking about sex at some point  
11 along the line. And as we mentioned, the policies cover more  
12 than just pronouns. They cover general statements of belief.  
13 And it does come up, which is -- the reason I brought up the  
14 surveys is an example of saying it does come up in class and so  
15 it is an issue of discussion.

16 But if I refer to Exhibit S, which is the email from  
17 district's counsel, if you notice, it offered an accommodation  
18 to avoid the use of pronouns. So if -- and only on the grounds  
19 of religion. My point being that if it requires a discussion  
20 about a, quote, accommodation to, quote, avoid the use of  
21 pronouns, it must be the case that the policy as a general  
22 matter requires the use of pronouns.

23 And as the Supreme Court -- my second point about the  
24 virtual necessity, the Supreme Court's decision in *Wooley v.*  
25 *Maynard*, it talks quite a bit about something that's very

1 analogous which is that it -- at some point, it is a virtual  
2 necessity for people to use -- it's not enough for the district  
3 to say, well, we're not literally pulling the words out of your  
4 mouth. If the government makes it incredibly burdensome or  
5 virtually impossible to avoid the use of doing something,  
6 that's the same thing for First Amendment purposes.

7 THE COURT: Let's go back for a moment, Mr. Hasson, to  
8 the school district policies. The way I read it, there are  
9 basically five categories of speech that are implicated here,  
10 prohibited speech.

11 First, we have policies prohibiting discriminatory  
12 speech that creates a threat of physical harm or violence to  
13 another student. And that's your Exhibit A at 2 and 3; that  
14 defining unlawful harassment in reference to speech that,  
15 quote, places a student in reasonable fear of harm to his or  
16 her person or damage to his or her property.

17 Second -- the second category is the policies prohibit  
18 speech that, quote, has the effect of substantially interfering  
19 with a student's educational performance, opportunities, or  
20 benefits.

21 Third, speech that prohibits discriminatory speech that  
22 has the, quote, effect of substantially disrupting the orderly  
23 operation of school.

24 Fourth, speech that proscribes repeated and persistent  
25 speech that creates a hostile, i.e., intimidating, threatening

1 or abusive, learning environment for students, and;

2 Fifth, the policies proscribe the use of derogatory  
3 language on the basis of an individual's identity, including  
4 the intentional misgendering of transgender students.

5 So the first of these categories fit within the first  
6 prong of *Tinker*. I don't think anybody really argues that.  
7 They proscribe speech that would tend to create a threat of  
8 physical harm, a substantial interference with the student's  
9 performance, or cause a substantial disruption to the operation  
10 of the school.

11 This is precisely what *Tinker* allows, restrictions on  
12 speech that substantially disrupt the operation of the school,  
13 including by interfering with the operation of the school and  
14 keep students from physical harm. You don't disagree with any  
15 of that, do you?

16 MR. HASSON: I do not disagree with the fact that  
17 *Tinker* provides a substantial disruption inquiry, if that's  
18 your question, Your Honor.

19 THE COURT: Now, to the Court -- and this is what I'm  
20 getting to, Mr. Hasson. The fourth and fifth categories pose a  
21 closer call. It's an unsettled question whether a hostile  
22 environment created by harassing language or bullying behavior  
23 or discriminatory comments is enough to constitute a  
24 substantial disruption on its own.

25 If you look at *Harper* and Judge Kozinski dissenting

1 where he noted that much of what harassment law seeks to  
2 prohibit, the First Amendment seeks to protect. And in *Saxe*,  
3 for instance, Alito -- then Judge Alito -- found that the  
4 anti-harassment policy in that case was overbroad because the  
5 policy's hostile environment prong did not, on its face,  
6 require any threshold showing of severity or persuasiveness.

7 Now, you just mentioned that the policies are overbroad.  
8 Are you relying on the fact, in part, of what Judge -- then  
9 Judge Alito said was a failure of showing severity or  
10 pervasiveness?

11 MR. HASSON: I would say that is a persuasive  
12 precedent. I think the precedent we think is directly on point  
13 is the Supreme Court's decision in *Davis v. Monroe County Board*  
14 *of Education* where it said that schools can punish conduct that  
15 is severe, persuasive, and objectively offensive such that it  
16 rises to the level of conduct and not speech.

17 But *Davis* was very clear that single instances do not  
18 rise to that level and that pure speech does not rise to that  
19 level.

20 THE COURT: What *Davis* said was that -- *Davis*  
21 authorized private damages actions against public school boards  
22 for student-on-student harassment only where the board has  
23 acted with indifference to known harassment that is, quote, so  
24 severe, persuasive and objectively offensive that it  
25 effectually bars the victim's access to an educational

1 opportunity or benefit.

2 MR. HASSON: Yes, Your Honor.

3 THE COURT: So are you saying that your clients'  
4 children are the victims here?

5 MR. HASSON: No. What we're saying is that school  
6 district policies can punish harassment that meets the standard  
7 set forth in *Davis*. And the school district's policy here is  
8 overbroad. In response to your question about overbreadth,  
9 it's overbroad because it fails to meet that *Davis* standard.

10 THE COURT: What I'm asking you is does it fail to  
11 meet the *Davis* standard because it doesn't have a threshold of  
12 pervasiveness?

13 MR. HASSON: Because it doesn't have severe,  
14 pervasive, and objectively offensive. It has to meet all  
15 three.

16 THE COURT: If we were to apply that test, would we  
17 look at it through the lens of the transgender student who the  
18 majority students want to call by what they and their parents  
19 believe is his gender by birth? Or should we look at it  
20 through this transgender student's eyes who is basically being  
21 picked on because -- going back to my example of Jim and Harry.  
22 Do you think that son Jim would find everybody calling him out  
23 of his name fun? Or should we look at it through his eyes?  
24 Would he be the victim or would the kids who could call him  
25 what they wanted to be the victim?

1           Because that's what it comes down to. These kids want  
2           to be able to call Terrence "he." They want to call him he.  
3           And they're saying this affects me that I can't call him he. I  
4           don't know how it affects me, but somewhere I learned in church  
5           that if you're born with a penis, you're a man and you will  
6           always be a man and you shouldn't be called "she." And that's  
7           what I learned in the church or that's what the science -- this  
8           science tells me. Because there's other science that says  
9           that -- what do they call it? Gender --

10           MR. HASSON: -- dysphoria, Your Honor.

11           THE COURT: Yeah. And other conditions where someone  
12           actually believes that he is a she. And we aren't in their  
13           bodies, and there's science that supports it. So I'm going to  
14           go out on a limb and assume that your clients are not  
15           scientists who are caught up in this debate, but they've chosen  
16           the science that they're willing to follow which is in  
17           alignment with their Christian values. I'm assuming that  
18           they're mostly Christians, not Muslims, not Buddhists, not  
19           Jeffersonian Deists.

20           MR. HASSON: I know they're motivated by their  
21           religious values. I didn't get into substantive, long,  
22           drawn-out theological conversations.

23           THE COURT: But they aren't scientists, are they?

24           MR. HASSON: No, Your Honor.

25           THE COURT: There are scientists who support the view

1       that Terrence is Terri. That's true, too, isn't it?

2               MR. HASSON: I know that there are -- that gender  
3       dysphoria is --

4               THE COURT: It's a real thing.

5               MR. HASSON: To your point, Your Honor, though, to  
6       address our position --

7               THE COURT: Yes.

8               MR. HASSON: -- I would redirect you to the Supreme  
9       Court's holding in *Barnette* where the Supreme Court said it  
10      doesn't matter whether the school thinks that the student's  
11      view is right or wrong. It's a constitutional harm to force  
12      someone to express a belief. And that's where --

13              THE COURT: That's my point. They aren't expressing a  
14      belief. What they're expressing is a -- you're arguing that  
15      they are -- you're making your argument based on a compelled  
16      speech doctrine. Am I right?

17              MR. HASSON: In that context. But, as we noted in our  
18      brief, it's also a viewpoint - discriminatory - which I would  
19      note that the Sixth Circuit in *Barr v. Lafon* said violates the  
20      *Tinker* standard per se -- is per se unconstitutional, *Tinker*  
21      aside, and we also believe it's overbroad.

22              THE COURT: Doesn't the school have the right to  
23      regulate speech, though, to make for a nonhostile environment,  
24      to make for a learning environment? Can't schools do that?

25              MR. HASSON: Of course they can, but it's on -- the

1     burden is on the school to show that there is any evidence that  
2     restricting speech will cause a substantial disruption. And by  
3     that, in *Tinker*, the Supreme Court meant classroom disruptions  
4     to the point that it prevents children from learning.

5             THE COURT: But they also -- they can regulate speech  
6     to the extent that they create an environment that is safe for  
7     all students to learn, a learning environment, a learning  
8     environment where the majority doesn't get to call someone out  
9     of their name or something other than what they are just  
10    because their science or their religion -- it's not like one of  
11    the students says: I'm Martian. I was born on Mars and you  
12    have to recognize that fact.

13            There's no science that supports that.

14            But you invoke science -- there's science that supports  
15    Terri's position that Terri is female even though Terri was  
16    born with a penis. So given that fact, what is the basis for  
17    your saying that this can't be -- this policy can't coexist  
18    with a learning environment consistent with the mission of  
19    schools? Because isn't that what the policy, in fact, does?  
20    It protects everyone.

21            Then that traces me back to a balancing test which we  
22    must also consider in this PI hearing, the interest of these  
23    students who say my science says one thing and the interest of  
24    this student, who is a victim of the majority, says my science  
25    supports my position that I'm Terri and not Terrence.



1 MR. HASSON: But the point from PDE's perspective,  
2 Your Honor, is it's irrelevant whose science is correct. The  
3 idea is that every student has a First Amendment right, whether  
4 or not the government thinks they're correct or incorrect, to  
5 express their opinion. And to the balancing test --

6 THE COURT: I agree with you. But that's why -- but  
7 your clients have an option because they aren't like the  
8 professor in *Meriwether*. They can call Terri by Terri's name.  
9 They don't have to call Terri he or she. They can call -- and  
10 that benefits Terrence. And it doesn't hurt them by saying  
11 call me by my name. Don't call me Harry. My name is Jim.  
12 Call me Jim. Don't call me Terrence. My name is Terri. Call  
13 me Terri. You don't have to get into "he" or "she."

14 MR. HASSON: I would have two responses to that, Your  
15 Honor. I would also like to address standing at some point as  
16 well.

17 THE COURT: I'm not as concerned about standing for  
18 you as I am for -- Mr. Freeze is going to have to spend about  
19 as much time on standing as you've spent on balancing these  
20 hardships. You each have your burden to bear.

21 MR. HASSON: Understood, Your Honor.

22 To your question, there are two responses to that. The  
23 first is that it's virtually impossible at some point to avoid  
24 using language about sex and gender, especially in a school in  
25 a classroom environment. But, secondly, by altering the

1 content of their speech, that alone is a First Amendment  
2 violation, which the Supreme Court held in *Riley* exactly that.  
3 And if they remain silent, compelled speech and compelled  
4 silence are simply two sides of the same coin. And the Supreme  
5 Court held exactly that in *Riley* as well. So, from our point  
6 of view, either way you look at it, there's constitutional  
7 harm. And First Amendment -- violations of First Amendment  
8 rights are irreparable, as the Supreme Court held in *Elrod v.*  
9 *Burns*.

10 To quickly kind of run through the -- our last remaining  
11 points -- I'm certain that I'm getting close to time.

12 THE COURT: I want to go back to *Davis* just for a  
13 second.

14 MR. HASSON: Certainly, Your Honor.

15 THE COURT: *Davis* sets a high standard for when a  
16 school board can be held liable to prevent student-on-student  
17 harassment. But does that have to dictate when a school may  
18 institute policies that restrict harassment? Because it  
19 appears -- and I'm going to get to Mr. Freeze on this, but it  
20 appears that the school board adopted these policies to  
21 restrict harassment.

22 While you're contemplating the answer, consider the  
23 categories of speech that schools regulate and the reason why.  
24 For instance, the Supreme Court has permitted restrictions on  
25 lewd speech in deference to, quote, the social interest in

1 order and morality -- that's the *Bethel School District* case  
2 which I'm sure you're familiar with -- and to the school's  
3 vital role in inculcating fundamental values of habits and  
4 matters of civility essential to a democratic society.

5 Now, speech promoting drug use can be punished in light  
6 of, quote, important, indeed, perhaps compelling interest in  
7 protecting students against the physical, sociological, and  
8 addictive effects of drugs. There was no suggestion in any of  
9 these cases that the schools would have been exposed to  
10 liability for failing to promote the habits and manners of  
11 civility, to awaken students to cultural values or norms that  
12 we seek to protect in a democratic society, or to protect  
13 students from addiction, or to protect students from  
14 harassment.

15 It's not as if the First Amendment gives a blanket  
16 prohibition against regulating any kind of speech in a school  
17 situation. *Tinker* makes that clear. *Tinker* has spawned --  
18 this is the progeny of *Tinker*. There are restrictions.

19 See, here is something that -- here's the elephant in  
20 the room. Trans students are real. They're not a figment of  
21 one's imagination. The science proves that. But they're in  
22 the minority. So you can slice it however you wish,  
23 Mr. Hasson, but what it amounts to is that the majority doesn't  
24 like the fact that there's somebody who was born with a penis  
25 who says that he is a she. And we don't know whether it's

1 gender dysphoria or what. And that poses a threat.

2 That won't be the first time in our nation's history  
3 when a difference posed a threat and then they hide behind  
4 religion or science. I'm so old, Mr. Hasson, that I remember  
5 the scientist who talked about the inherent inferiority of  
6 black people which justified slavery. And you know what? The  
7 tragedy is that's not dead yet because there's some educators  
8 who believe that the slaves benefited from slavery. I was  
9 trying to contact some old people in my family to find out if  
10 they had passed those benefits down through the generations  
11 because I seem to have missed my benefit. But, anyway, that's  
12 another story.

13 So I'm not so uncertain that that's what we have here  
14 because this is not a *Davis* case. Speech can be regulated to  
15 prevent harassment and speech can be regulated to promote a  
16 learning environment. If these kids who have a higher  
17 incidence of suicide, a higher incidence of harassment - that's  
18 what the data shows - can't be protected, then -- and the only  
19 way they can be protected is by the same curb of speech that  
20 was used in *Bethel School District* in the interest of -- social  
21 interest and morality, what's more vague than social interest  
22 and morality?

23 So I know that I've given you a lot, but I will allow  
24 you to end without interruption, Mr. Hasson, with a response to  
25 those series of questions.

1           MR. HASSON: Thank you, Your Honor. And taking them  
2 one at a time.

3           THE COURT: And you get points for even remembering  
4 them all.

5           MR. HASSON: I'll do my best.

6           Taking those one at a time, for the *Davis* question, of  
7 course, schools can regulate conduct, and *Tinker* says they can  
8 also regulate speech. But it has to meet a certain standard.  
9 So if we're addressing the *Tinker* standard, the Sixth Circuit  
10 in *Fisher* said that the *Tinker* standard is essentially narrow  
11 tailored. To survive that, you have to show some kind of  
12 evidence, some kind of support to forecast that it is  
13 absolutely necessary to restrict the speech to prevent  
14 classroom disruption, things like complete disruptions and  
15 shutdowns of abilities to learn.

16           What *Davis* said was that to meet the First Amendment  
17 standard for harassment in particular, it has to apply to  
18 conduct, not speech. And that was specifically in response to  
19 Justice Kennedy's dissent in that case where he raised First  
20 Amendment concerns. The majority in *Davis* specifically  
21 referenced the First Amendment and said we have -- in response  
22 to Justice Kennedy, we have created the standard that requires  
23 things to be repeated, objectively offensive, and severe such  
24 that it crosses the line from speech into conduct. Here, the  
25 district does not contest at all that it punishes speech. So

1 we're firmly in First Amendment land now.

2 To the other point, in reference to the shameful history  
3 of discrimination in our country, the Sixth Circuit in  
4 *Meriwether* actually distinguished invidiously hateful rhetoric  
5 such as the nature that you alluded to with statements about  
6 gender identity. And the way it did so is it -- in *Dambrot*,  
7 the Sixth Circuit held that a public university basketball  
8 coach could not recover for First Amendment retaliation because  
9 his use of racial slurs did not touch on a matter of public  
10 concern. They simply had no redeeming value.

11 In *Meriwether*, the Sixth Circuit referred back to that  
12 and said we properly concluded that in *Dambrot*, that that  
13 language had no redeeming value and didn't touch on a matter of  
14 public concern. But pronouns and gender identity, sex-specific  
15 language, do touch on a matter of public concern and that's why  
16 it was different there. That's how I would distinguish those  
17 two issues.

18 THE COURT: Would you just add one thing to that and  
19 tell me how the use of pronouns in this case touches on a  
20 matter of public concern.

21 MR. HASSON: What I would say is it's speech about a  
22 political issue and an idea that is being hotly debated in our  
23 country right now, as you referenced earlier. And that's  
24 specifically, exactly what the Supreme Court said in  
25 *Meriwether*. And as the Supreme Court recognized in *Tinker*,

1 students do have First Amendment rights. And inherent in those  
2 First Amendment rights is the ability to engage in political  
3 speech or speech about matters of public concern. And that's  
4 exactly what the Court held in *Tinker*. It emphasized that.  
5 That's where I would cite to.

6 If you have any further questions.

7 THE COURT: Not at this time. Thank you for answering  
8 my questions, Mr. Hasson.

9 MR. HASSON: Thank you, Your Honor.

10 THE COURT: You still have five minutes for rebuttal.

11 Mr. Freeze.

12 Mr. Freeze, I know that you're anxious to get to some of  
13 the issues that Mr. Hasson raised. I'm anxious for you to get  
14 to them, but I want you to start with standing.

15 MR. FREEZE: To start, plaintiff has not presented  
16 sufficient evidence to meet the first prong of the standing  
17 decision which is invasion of a legally protected interest.

18 Not to delve too deep into the merits at this point,  
19 Your Honor, but I think there is overlap here. I think you  
20 made the point that there is no legal right that has been  
21 recognized by the federal courts or in federal law suggesting  
22 that a particular individual has the right or -- to use a  
23 pronoun versus a noun when speaking. I think at the end of the  
24 day, that's what we're talking about here.

25 THE COURT: Do you think that we have associational

1 standing in this case?

2 MR. FREEZE: I think there is associational standing  
3 from the standpoint that these members are members of the  
4 organization. I think they failed to meet, however, the  
5 elements that are necessary --

6 THE COURT: Which elements specifically do you believe  
7 that they failed to meet? So they -- associational standing  
8 exists when the members of the organization would otherwise  
9 have standing to sue in their own right. Secondly, the  
10 interests at stake are germane to the organization's purpose,  
11 and; third, neither the claim asserted nor the relief requested  
12 requires the participation of individual members in the  
13 lawsuit. That's, of course, from *Friends of the Earth*.

14 MR. FREEZE: I think the first and the third elements  
15 there, Your Honor.

16 THE COURT: Okay. Let me ask you this. Do the  
17 plaintiffs need to wait to be punished? I know that there was  
18 correspondence back and forth with the board or maybe with the  
19 school principal from one of the concerned parents. Do they  
20 need to wait to be punished or prosecuted to bring a facial  
21 challenge especially where they have refrained from certain  
22 conduct for fear of punishment? In other words, the mother's  
23 son has refrained from calling Terrence a "she" because of fear  
24 of punishment. So do the plaintiffs need to wait?

25 MR. FREEZE: Not in all circumstances, Your Honor.



1 But in this circumstance, I don't believe they have put forth  
2 in front of this Court a sufficient legally protected interest  
3 that is concrete and particularized nor actual or imminent.

4 THE COURT: But in the First Amendment context, can't  
5 the plaintiffs bring a pre-enforcement challenge if they intend  
6 to engage in expression that the First Amendment would protect,  
7 or their expression is arguably proscribed by the policies at  
8 issue and they face a credible threat of enforcement of the  
9 rules?

10 MR. FREEZE: Your Honor, the subjective chill factor  
11 is insufficient to convey standing upon a plaintiff. There  
12 needs to be more than that. It can't be simply a subjective  
13 belief that there may be discipline in the future or some  
14 speculative potential future injury.

15 THE COURT: What if there's some indication of  
16 imminent enforcement?

17 MR. FREEZE: If there was some indication of that,  
18 then I think that would convey an injury. But we don't have  
19 that in this case.

20 THE COURT: We don't have it in this case because the  
21 plaintiffs have refrained from calling Terrence "she."

22 MR. FREEZE: Well, Your Honor -- and I believe that  
23 that, again, gets back to whether there is any legally  
24 protected interest here. There are accommodations available  
25 from the school district. You can call Terrence "Terri." You

1 cannot talk to this student at all. You can avoid seeing this  
2 student.

3 This is not the situation in *Meriwether* where a teacher  
4 needs to teach to a specific room of students. The Olentangy  
5 Local School District has over 23,000 students. Less than one  
6 percent of those students identify in some way as transgender.

7 THE COURT: How many students in the Olentangy School  
8 District identify as trans?

9 MR. FREEZE: That we are aware of, approximately 50,  
10 Your Honor.

11 THE COURT: Fifty?

12 MR. FREEZE: Yes.

13 THE COURT: Are they concentrated in a particular  
14 school or grade?

15 MR. FREEZE: Your Honor, I don't have that  
16 information.

17 THE COURT: Okay. Let me ask you this before you get  
18 into the heart of your argument, Mr. Freeze. What factors  
19 prompted the school district to enact the transgender policies,  
20 anti-harassment policies?

21 MR. FREEZE: I think an important fact for this Court  
22 to be aware of is that the current iteration of the policy that  
23 is a part of the board policies was last amended in April of  
24 this year. But those amendments were technical changes. This  
25 addition of gender identity to the policies has been in place

1 since 2013. I believe at that point, that was when the Obama  
2 Administration was looking at Title IX protections and that  
3 federal law began to shift in the manner where these  
4 protections were being extended under Title VII and Title IX  
5 both to transgender and nonbinary students.

6 I believe what the district was trying to do was, as  
7 closely as it can, mirror federal law and federal requirements  
8 when adopting these policies. I think you made a good point  
9 earlier, Your Honor, that when you look at these policies, in  
10 some ways, they're almost ripped from the federal law and put  
11 into the policy notebook. These policies are not adopted in a  
12 vacuum. They were adopted pursuant to and consistent with  
13 federal law.

14 So the issue of transgender, nonbinary students being  
15 protected under these federal laws was arising and that's how  
16 it ended up in the policy since 2013. That's specific to 5517,  
17 Your Honor. I can tell you the addition of that language did  
18 not make it into the personal communication device policy until  
19 2017.

20 THE COURT: Please proceed.

21 MR. FREEZE: Sure, Your Honor.

22 So to continue on standing, Your Honor, I think, again,  
23 we're dealing with actual or imminent harm here. I think an  
24 important note on the communication between general counsel for  
25 the school district and the parent is that, yes, misgendering a

1 student would be considered discrimination, and no place in  
2 those emails does it suggest that it would rise to the level of  
3 harassment per se or bullying per se to the extent that it  
4 would subject that student to discipline.

5 In fact, the follow-up email specifically asks whether  
6 the student would be disciplined for their religious beliefs,  
7 and the answer is no. But, at the same time, the school  
8 district protects all students from harassment and bullying and  
9 does not believe it's appropriate, nor does federal law require  
10 the district to allow certain students, for certain points of  
11 view, to use the First Amendment as a sword to bully and harass  
12 other students, specifically, in this instance, very vulnerable  
13 students based on the nature of their being. There is no First  
14 Amendment right to have carte blanche access to harass or bully  
15 students based on a particular factor of their being.

16 In this case, I think that's really what's being  
17 requested. The challenge is to the policies as a whole. Those  
18 policies protect all manner of protected classes. But --

19 THE COURT: Would you address Mr. Hasson's overbreadth  
20 argument first, please?

21 MR. FREEZE: Sure, Your Honor.

22 From the overbreadth perspective, I believe you've  
23 already mentioned, Your Honor, the first three manners of  
24 speech that we are dealing with are basically lifted from  
25 *Tinker*. When we are talking about the fourth element which is

1 essentially the hostile environment aspect, we're looking at  
2 the bullying policy. I think it's important to note what the  
3 definition of that bullying policy is. It requires severe or  
4 pervasive actions but it also requires, in order to raise the  
5 level under the board policies to unlawful harassment, that  
6 those actions be taken in a systematic and chronic manner  
7 toward one person.

8 Only when bullying raises to the severe, persuasive,  
9 systematic, and chronic level would it then constitute  
10 harassment and then be subject to potential discipline under  
11 the harassment policy. So from that perspective, these  
12 policies are quite narrowly tailored.

13 The first three prongs that you mentioned are  
14 essentially from *Tinker*. The fourth is essentially lifted from  
15 Title IX requirements, Your Honor. I don't subscribe, nor does  
16 the district, to the concept that a district is powerless to  
17 create a good learning environment for its students unless and  
18 until it meets that Title IX pervasive standard to which it  
19 might be subject to civil liability. I believe that a district  
20 is able to and even required to intervene before --

21 THE COURT: But in order to invoke it, is there a need  
22 for there to be a threshold of pervasiveness as *Davis* found?

23 MR. FREEZE: I think to understand *Davis* -- I mean,  
24 *Davis* is talking about what would subject a school district to  
25 civil liability under Title IX. I think that's a different

1 conversation than the one we're having. Under *Davis*, the  
2 Supreme Court found that under Title IX, yes, a school district  
3 could be subject to civil liability when the school board acted  
4 with deliberate indifference to known harassment and the  
5 harassment was so severe, pervasive, and objectively offensive  
6 that it effectually barred the victim's access to an  
7 educational opportunity or benefit.

8 *Davis* doesn't stand for the concept that a school  
9 district is unable to or legally prevented from intervening in  
10 any type of situation until it becomes so severe, pervasive,  
11 and objectively offensive that it effectively barred the  
12 victim's access to an educational opportunity. It talks about  
13 that in the context of civil liability. So we're going back to  
14 the *Tinker* standard, again, as to when these types of speech  
15 would be proscribed, Your Honor.

16 Since you asked about standing, Your Honor, if you'd  
17 like me to continue.

18 THE COURT: I have nothing further for you on  
19 standing.

20 MR. FREEZE: Okay. Thank you.

21 Your Honor, plaintiffs spent a significant amount of  
22 time talking about *Meriwether*. I think *Meriwether* is clearly  
23 distinguishable in this instance. *Meriwether*, one, involved a  
24 university professor. It involved issues of academic  
25 expression and freedom in the university setting. That, from

1 the beginning, shows two big differences.

2 One, federal law consistently treats kindergarten  
3 through 12 schools differently than it treats universities.  
4 And certain aspects of the First Amendment and free speech that  
5 may be allowed or inherent on college campuses may not be so  
6 extensive in the K through 12 setting.

7 The second issue is *Meriwether* himself was an employee;  
8 in that particular instance, was dealing with students that he,  
9 in large part, had no option whether to deal with or not. And  
10 it also implicated his religious beliefs which, based on  
11 plaintiff's representation earlier, are not at issue in this  
12 case, Your Honor.

13 THE COURT: Let me ask you this. Under *Meriwether*,  
14 which kind of articulates the compelled speech doctrine, do the  
15 policies require the speaker to affirm a certain belief? That  
16 is, by not using a pronoun, or by using "she" for Terrence,  
17 does that require, as Mr. Hasson seemingly alluded to, an  
18 affirmation of or belief of a hot button item in public debate  
19 now, that is, that I recognize you as trans?

20 MR. FREEZE: The Sixth Circuit in *Meriwether* said it  
21 did. I think that that follows from *Meriwether*. I think the  
22 distinction from *Meriwether* is the university in that case was  
23 unwilling to provide any type of accommodations, one, as to  
24 what he could call these individuals, and; two, as to more  
25 generalized speech as to these particular topics within the

1 realm of his curriculum.

2 THE COURT: Let me ask you a similar question or maybe  
3 a variation on the same theme. Can you use a pronoun to  
4 respect someone without agreeing with that person's gender  
5 identity? In other words, by calling Terrence "she," does  
6 that -- does the speaker, then, by doing so, say that I  
7 acknowledge, Terrence, that you're transgender? Or can you do  
8 that out of respect? That's what, I, Terrence, want to be  
9 called.

10 MR. FREEZE: That certainly is the district's  
11 position. This is a situation where a little respect and  
12 tolerance would go a long way. We're standing here in federal  
13 court, and I'm standing here arguing in front of you, Your  
14 Honor. I think there is a pretty easy way to get to a place  
15 where we aren't here, Your Honor, if there was a little bit  
16 respect and tolerance shown by certain folks to others.

17 I understand that there are constitutional issues that  
18 are potentially implicated here, Your Honor, but I think that  
19 could certainly be a matter of: I'm going to call you what you  
20 want to be called because I respect you as a person. I  
21 understand that that's not my personal view, but I'm willing to  
22 do that. So --

23 THE COURT: Doesn't that play right into what  
24 Mr. Hasson said? You're compelling someone to acknowledge  
25 something that they don't want to acknowledge. That student



1 does not want to acknowledge that Terrence is "she." And why  
2 is that not covered by *Meriwether*?

3 MR. FREEZE: Your Honor, it's not covered by  
4 *Meriwether*, one, because it's an employment case; two, because  
5 that involved religious freedom; three, because it involved  
6 employment and religious freedom in the university context;  
7 four, because *Meriwether*, in that particular context, had to  
8 deal with those same students almost every day; five, because  
9 *Meriwether* didn't allow any accommodations. The university  
10 didn't allow any accommodation as --

11 THE COURT: What accommodations has Olentangy allowed?

12 MR. FREEZE: I can tell you that this policy, from our  
13 understanding and recall, has never been enforced against a  
14 student who has made a comment to a transgender student or a  
15 nonbinary student. So I think the answer is none because the  
16 circumstances haven't presented themselves with the exception  
17 of the email that was presented with plaintiff's complaint. In  
18 that email, there's a specific note from Attorney Philemond:  
19 Please let us know if you would like to discuss accommodations.

20 I believe the parent's response was that they are happy  
21 to join them in discussing this, but by no means do I desire  
22 the administration of Olentangy to instruct my children on such  
23 matters without me being present. There was no follow-up in  
24 regards to that as far as I'm aware, Your Honor.

25 THE COURT: Thank you, Mr. Freeze. I have nothing

1 further.

2 MR. FREEZE: Thank you, Your Honor.

3 THE COURT: Mr. Hasson, I might have a couple of more  
4 questions for you, just a couple.

5 Is it possible, in the context of *Meriwether*, to use  
6 pronouns to respect someone without agreeing with their gender  
7 identity? Is that possible?

8 MR. HASSON: I would refer back to what the district  
9 just said which was that under their understanding of  
10 *Meriwether*, and that's our understanding of *Meriwether* as well,  
11 the use of pronouns, and especially the compelled use of  
12 pronouns which I understand my friend on the other side of the  
13 aisle to -- conceded that's what the policy does, inherently  
14 carries an idea. So it would be impossible to --

15 THE COURT: I understand. I'm going to let you finish  
16 that, but you realize that didn't answer my question. I asked  
17 you if it was possible to use the pronoun out of respect  
18 without agreeing with their gender identity. Is it possible?

19 MR. HASSON: I think pronouns inherently carry an  
20 idea. So it's possible to respect a student, but, once you use  
21 a pronoun that does not align with biological sex, if your  
22 belief is that people are only male or female, you can't do  
23 that without expressing an idea.

24 THE COURT: As a lawyer, every argument you make it's  
25 your idea or is it just the position that you're taking?

1 MR. HASSON: In this context --

2 THE COURT: That's a rhetorical question, Mr. Hasson,  
3 because you and I both know that the answer is no. You argue  
4 positions that advance your client's interests that are  
5 consistent with your ethics, et cetera, but they may or may not  
6 be the position that you personally take. Am I correct?

7 MR. HASSON: Of course, Your Honor.

8 THE COURT: Of course I'm correct on that. Every  
9 lawyer in America knows that. But you're saying once I use a  
10 pronoun, then that per se means that I am on one side of the  
11 transgender debate or another. I automatically accept that  
12 person as transgender and I automatically accept the fact and  
13 reality of transgenderism.

14 But you're telling me that it's impossible for me to  
15 say, Terrence, I don't believe in this, but if you say that  
16 you're a she, I'm going to call you she.

17 That's impossible, Mr. Hasson.

18 MR. HASSON: I think it's impossible to speak in the  
19 manner the district is trying to compel without publicly  
20 affirming an idea --

21 THE COURT: We're trying to figure out how *Meriwether*  
22 fits here. So you've got to help me because you want  
23 *Meriwether* to control. You've got a little bit of a problem  
24 with *Meriwether* because *Meriwether* is factually  
25 distinguishable. It may or may not control. But I need your

1 insight into this, and I need you to answer my questions  
2 directly. I don't want -- I understand some of the nuances  
3 that you and Mr. Freeze are talking about. I want to know my  
4 hypothetical. That's the point of oral arguments.

5 Is it possible for someone to use a pronoun without  
6 conveying or agreeing with the listener's gender identity?

7 MR. HASSON: I think it's impossible to publicly state  
8 that someone is that without making a public statement that you  
9 do not yourself believe. And that's --

10 THE COURT: So the answer is no, it's not possible.  
11 Because you changed my hypothetical on me, Mr. Hasson. I don't  
12 want you to change my hypothetical.

13 MR. HASSON: My apologies, Your Honor.

14 THE COURT: I'll let your hypothetical stand. You  
15 posed your hypothetical and answered it. Fine. Now you can  
16 get to mine. Mine is, is it possible to call Terrence "she"  
17 out of respect as opposed to out of agreeing with Terrence's  
18 gender identity?

19 MR. HASSON: It would be impossible to do so without  
20 also conveying an idea that you don't believe. That's the  
21 constitutional injury, is being forced to do that or being  
22 punished for refusing to do that, which is where the viewpoint  
23 comes in, the viewpoint-based discrimination comes in, and the  
24 overbreadth.

25 As part of rebuttal, Your Honor, I would like to very

1 briefly walk through the three-prong test for standing from  
2 *Susan B. Anthony*, and then conclude with a point about  
3 viewpoint discrimination and compelled speech from *Barnette*  
4 because --

5 THE COURT: I'm going to help you here, Mr. Hasson. I  
6 want you to take the time that you were going to talk about  
7 standing and devote it to the other two prongs.

8 MR. HASSON: To the balance of the equities and public  
9 interest, Your Honor?

10 THE COURT: That's exactly right.

11 MR. HASSON: Absolutely, Your Honor.

12 What I would say there is that the courts have -- in  
13 terms of the balance of the equities, because speech first  
14 is -- or, excuse me, because PDE is, first of all, likely to  
15 prevail on their speech claims, the school district has no  
16 interest in enforcing an unconstitutional policy. They can --  
17 if this policy is enjoined, they can simply rewrite policies  
18 that comply with the Constitution the next day. And we cited  
19 that in our reply brief. That's the *Doe v. Pennsylvania County*  
20 case out of the Western District of Virginia.

21 Moreover, because violations of First Amendment rights  
22 are per se irreparable, as the Supreme Court held in *Elrod v.*  
23 *Burns*, the students have a very strong interest in being able  
24 to exercise their constitutional rights, and the school  
25 district has very little interest in violating those rights.

1 And there's nothing in injunction, as we just mentioned, that  
2 would prevent them from protecting other students.

3 As far as the public interest, we believe it's always in  
4 the public interest to require government actors to respect the  
5 Constitution. So, for those two prongs, Your Honor, we believe  
6 that because we're likely to prevail on the merits that those  
7 necessarily fall into place as well.

8 To get back to the merits very quickly, Your Honor, in  
9 the *Barnette* opinion, the Supreme Court said on page 635 that  
10 it did not matter whether someone's view flowed from religion  
11 or from anything else because the constitutional harm was  
12 inherent in the fact that they're being compelled to speak or  
13 punished for refusing to do so.

14 THE COURT: *Barnette* was a case in which the student  
15 was required to salute the flag. The Court struck down a  
16 requirement that school children salute the American flag  
17 because it was -- they said that -- well, the school had argued  
18 that it promoted national unity. But it was really compelling  
19 the speaker's affirmative belief.

20 MR. HASSON: Indeed, Your Honor.

21 THE COURT: Which the Court found would force  
22 orthodoxy.

23 Now, the courts have noted that public educators can  
24 compel speech. You know that. There was a class -- there was  
25 a case in which -- I don't remember the name of it right now,

1 but the math teacher could compel students in math class to  
2 talk about math and not about something else. You can compel a  
3 student to submit their homework. You can compel a student to  
4 answer questions in class.

5 So there's no per se proscription against compelled  
6 speech in the classroom or in the school setting. I'm right  
7 about that, aren't I, Mr. Hasson?

8 MR. HASSON: But this is a public issue.

9 THE COURT: Am I right about that?

10 MR. HASSON: You're right, Your Honor. You're right  
11 about you can require a student to answer questions. But what  
12 you can't do is require --

13 THE COURT: So what it really comes down to is that  
14 the compelled speech doctrine in the public school context  
15 focuses on the rationale behind the policy. So the question  
16 before this Court is not whether the policies compel speech, in  
17 my view, but whether they do so for an impermissible reason  
18 since we all know that schools can compel speech.

19 You can't argue that because that's what the case law  
20 says, okay. So they can compel speech in certain limited  
21 context, Mr. Hasson. You know that and I know that. And if  
22 I'm incorrect, just point me to the case that says under no  
23 circumstances can they compel speech.

24 Is there such a case? Of course there isn't. Or were  
25 you about --

1 MR. HASSON: I was just going to clarify that our  
2 position is you can't compel speech about political issues or  
3 anything about matters of public concern.

4 THE COURT: You're correct about that. But what if  
5 this Court found that they could compel speech to maintain a  
6 safe learning environment? Or in the interest of pedagogy, to  
7 maintain a pedagogically sound learning environment? What  
8 about creating an environment in which the students feel  
9 respected, acknowledged, heard by their classmates, the use of  
10 preferred pronouns would allow all students to feel comfortable  
11 in participation in discussions and the like? Or would that be  
12 the Court weighing in on a political matter? Would that still  
13 be forcing the students to weigh in on a political matter?

14 The schools do have a responsibility for creating a safe  
15 learning environment for all students. How does this threaten  
16 your clients' students' safety?

17 MR. HASSON: How does it threaten their safety to be  
18 forced to...

19 THE COURT: Using preferred pronouns threaten your  
20 clients' children's safety.

21 MR. HASSON: I would say the use of pronouns either  
22 way is not a safety issue for a student in either direction.  
23 What it is is a constitutional right. What it does is it  
24 violates their constitutional rights, and that is irreparable  
25 harm.



1 THE COURT: All right. Thank you, Mr. Hasson.

2 MR. HASSON: Thank you, Your Honor.

3 THE COURT: Because I understand that we are coming up  
4 on the school year more rapidly than I'm sure your clients'  
5 kids or kids on the other side -- all kids think that summer is  
6 coming to a close too quickly and they're not quite ready to  
7 get back. They weren't even thinking about lofty issues about  
8 what they can call their classmates. They're thinking about  
9 one more week at Disney or something like that. But I  
10 understand that it's imminent, and so I will -- I want to give  
11 further consideration to some of the points raised at oral  
12 argument.

13 I hope to have an opinion out by close of business  
14 Wednesday and certainly by this week so that you will -- the  
15 school district will have an understanding, as will the  
16 plaintiffs, of what the rules of engagement will be on this  
17 upcoming school year. But I appreciate the argument back and  
18 forth. It was very illuminating to the Court.

19 Mr. Hasson, Mr. Freeze, thank you very much for your  
20 patience and for listening carefully to the questions and  
21 answering them directly. That was very helpful.

22 For those of you who have to travel, good luck. I hope  
23 you travel safely. We all know that there are certain  
24 challenges associated with flight these days. So I hope that  
25 you can all get back before your kids start school in later

August or September.

Ms. Stash.

(Proceedings concluded at 11:29 a.m.)

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C E R T I F I C A T E

I, Shawna J. Evans, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Algenon L. Marbley, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Shawna J. Evans  
Shawna J. Evans, RMR, CRR  
Official Federal Court Reporter

August 10, 2023